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No. 86-3

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

SUZANNE LINDLEY DALY,
Petitioner,

v.

NAN TOEWS DALY,
Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

Respondent Nan Toews Daly hereby opposes the Petition for a Writ of Certiorari to the Supreme Court of the State of Nevada.

COUNTER STATEMENT OF THE CASE

The Statement of the Case as set forth in the Petition is an emotional, argumentative and factually distorted presentation, relying on evidence favoring Petitioner's contentions while ignoring evidence relied upon by the Trial Court which supported its ruling. Respondent adopts and relies upon the statement of facts as set forth by the Nevada Supreme Court in its Opinion, (App. 1, pp. 1-3; 102 Nev. Adv. Op. No. 20 (1986) which it found to be amply supported by the Trial Court Record before it.

REASONS FOR DENIAL OF WRIT

THE DECISION OF THE NEVADA SUPREME COURT IS BASED ON INDEPENDENT GROUNDS OF STATE LAW, AND THE PETITION FOR A WRIT OF CERTIORARI FAILS TO PRESENT A SUBSTANTIAL FEDERAL QUESTION FOR REVIEW

Although the Petitioner strains mightily to find constitutional grounds upon which to challenge the decision of the Nevada Supreme Court, the Record simply does not support her[1] effort. By characterizing the decision of the Trial Court and the Nevada Supreme Court as being premised solely upon her transsexualism or gender dysphoria, the Petitioner alleges that the termination of her parental rights violated rights protected by the United States Consitution, to-wit: (1) her rights as a parent were denied without Due Process of Law by a ruling which based termination thereof solely upon "the best interest of the child without a showing of parental unfitness"; (2) the Nevada statute (N.R.S. 128.105) which permits the termination of parental rights is "void for vagueness" in violation of the Due Process Clause; and (3) the statute as applied denied Petitioner the Equal Protection of the Law.

The immediately obvious fallacy in Petitioner's analysis and argument is that both the decision of the Trial Court and the decision of the Nevada Supreme Court carefully point out that the Petitioner's starting premise is false—*i.e.* the termination of Petitioner's parental rights was not based on the fact of her gender dysphoria as she asserts, but rather was based upon the effect of her lifestyle on the mental and emotional health of the child. The order of termination was not to punish Petitioner for her condition as she claims, but rather to protect the child from the effects of such condition on her child's welfare. If a mother were suffering from such acute alcoholism that she abused her child and neglected her welfare, a resulting order of termination would not be punishment for the alcoholism, but rather an effort to protect the child from the effects of such condition.

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[1] Use of the feminine pronoun is in accordance with the Petition at the request of Petitioner (footnote 2, page 3 of Petition)

The fact that the Trial Court focused its inquiry on the effects of Petitioner's condition of the child rather than basing its opinion on the fact of the condition itself is manifest throughout its written Decision, and summarized in the following language concluding the opinion:

> "The Court is abundantly aware that we have to be careful when we tamper with fundamental rights, constitutional rights, and here, by natural rights, i.e., mother and father.
>
> "There is a suggestion in counsel's argument that Respondent is being discriminated against because she is a transsexual. This Court is keenly aware of this situation and endeavors to avoid it in rendering a decision on the facts.
>
> "The record fairly discloses that the surrounding circumstances in the situation here involved is now adversely affecting Respondent's relationship with the child and impairs the child's emotional development and the child is not prepared to cope with it. The evidence shows that the anxiety and confusion created over this termination proceeding is not to the advantage of this child." (App. 26)

Similarly, the focus of the Nevada Supreme Court on the effects of Suzanne's condition and resulting lifestyle as opposed to the mere fact of her transsexualism is clearly discernible from its opinion. Wherein it states:

> "The trial court was fully aware of the seriousness and finality of a decree terminating parental rights, noting that such a remedy should be applied with caution. The court carefully considered the record and found abandonment and risk of serious mental and emotional harm. The court also found Suzanne to be a selfish person whose own needs, desires and wishes were paramount and were indulged without regard to their impact on the life and psyche of the daughter, Mary.

The Supreme Court then reviewed the impacts of Suzanne's lifestyle on Mary, with particular emphasis on Mary's reactions thereto, and concluded:

> "The resulting equation does not bode well for the emotional health and well-being of the child. This Court can perceive no basis for such disruption of Mary's life. Nor do we see the necessity for inflicting a continuing sense of instability and uneasiness on this child. As noted previously, when Mary reaches the age of majority she can decide whether to reinstate a relationship with Suzanne. In the meantime, given the circumstances concerning Mary's view of Suzanne and the extent of her opposition to further ties with a vestigial parent, it can be said that Suzanne, in a very real sense, has terminated her own parental rights as a father. It was strictly Tim Daly's choice to discard his fatherhood and assume the role of a female who could never be either mother or sister to his daughter." (App. 8-9)

In view of the considerations which led to the respective decisions of the Trial Court and the Supreme Court of the State of Nevada, it is respectfully submitted that the issues herein involved are uniquely issues of state law in an area in which this Court has previously encouraged state law innovation and experimentation without interference by the federal courts. *See Lehman v. Lycoming County Children Services* Agency, 458 U.S. 502, 73 L.Ed.2d 928 (1982), where, in upholding the denial of federal habeas corpus relief to challenge an order terminating parental rights, this Court said: [458 U.S. at 513]

> "The State's interest in finality is unusually strong in child custody disputes. The grant of federal habeas would prolong uncertainty for children such as the Lehman sons, possibly lessening their chances of adoption. It is undisputed that children require secure, stable, long-term, continuous relationships with their parents or foster parents. There is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his current home under the care of his parents or foster parents, especially when such uncertainty is prolonged. Extended uncertainty would be inevitable in many cases if federal courts had jurisdiction to relitigate state custody decisions."

See also, *Santosky v. Kramer*, 455 U.S. 745, 71 L.Ed.2d 599, 102 S.Ct. 1388 (1982), where the dissenting justices pointed out: [455 U.S. at 770-771]

> "I believe that few of us would care to live in a society where every aspect of life was regulated by a single source of law, whether that source be this Court or some other organ of our complex body public . . . If ever there were an area in which federal courts should heed the admonition of Justice Holmes that 'a page of history is worth a volume of logic' it is in the area of domestic relations. This area has been left to the States from time immemorial, and not without good reason . . .
>
> * * *
>
> "State intervention in domestic relations has always been an unhappy but necessary feature of life in our organized society. For all of our experience in this area, we have found no fully satisfactory solutions to the painful problem of child abuse and neglect. We have found, however, that leaving the States free to experiment with various remedies has produced novel approaches and promising progress.
>
> "Throughbout this experience, the Court has scrupulously refrained from interfering with State answers to domestic relations questions. 'Both theory and precedents of this Court teach us solicitude for State interests, particularly in the field of family and family-property arrangements.' *United States v. Yagell*, 382 U.S. 341, 352, 86 S.Ct. 500, 507, 52 L.Ed.2d 404 (1966)."

The case at bar is a classic demonstration of the validity of the foregoing observation, since a comparison of the majority and dissenting opinions of the Nevada Supreme Court (App. 1-20) shows that all of the Justices recognized the danger to Mary's emotional health as a result of the Petitoner's life-style, and all agreed that there should not be visitation at this time in the child's development. The Justices parted company only with regard to the appropriate remedy, the dissenting Justices expressing the opinion that a less drastic and final remedy than termination of parental rights might be fashioned. This is precisely the

type of experimentation by the administrators of state law which this Court has held should be encouraged without interference by the federal courts. The United States Supreme Court has recognized, however, that the parent-child relationship is a fundamental one which is protected by the Due Process Clause, particularly when it is the State which seeks to destroy the relationship. This is particularly true in the area of procedural Due Process rights, such as the extent of the burden of proof (*Santosky v. Kramer*, 455 U.S. 745, 753 (1982) or the right of an indigent parent to counsel. (*Lassiter v. Department of Social Services*, 452 U.S. 18 (1981). However, it is submitted, as set forth in detail below, that protected constitutional rights have not been violated by the decision of the Nevada Supreme Court in this case.

1. The Nevada Courts Applied the Appropriate Substantive Standard in Reaching Its Decision

The first contention which the Petitioner makes is that the State of Nevada terminated her parental rights without a finding of parental unfitness, solely on the guideline of the "the best interests of the child", relying on language of this Court in *Quilloin v. Walcott*, 434 U.S. 246 (1978) which is quoted on pages 12 and 13 of the Petition. The quoted language, however, is taken completely out of context by omitting the qualifying language which followed it, which qualifying language applies with equal force to the facts presented in the case at bar. What this Court actually held in *Quilloin v. Walcott, supra,* was stated thusly: [434 U.S. at p. 255]

> "We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interests.' *Smith v. Organization of Foster Families,* 431 U.S. 816, 862-863, 97 S.Ct. 2094, 2119, 53 L.Ed.2d 14 (1977) (Stewart, J. concurring in judgment). But this is not a case in which the unwed father at any time had or sought actual or legal custody of his child. Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child had never

> before lived. Rather, the result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except applellant. Whatever might be required in other situations, we cannot say that the State was required in this situation to find anything more than that the adoption, and denial of legitimation, was 'in the best interests of the child.' "

Thus, the actual holding of the *Quilloin* case was that where the State does not seek to disrupt an existing family unit, and the affected parent has not previously had or sought actual or legal custody of the child, the appropriate quideline, which may be the sole quideline in those limited circumstances, is "the best interest of the child". That, of course, is precisely the situation presented at bar. The Nevada Supreme Court noted that the family unit comprised of Mary, her mother and grandmother, is a sound, stable and loving nurturing environment for the child, that the Petitioner's efforts to acclimate Mary to his "alternative lifestyle" was disruptive and emotionally damaging to the child, that the child did not want to have anything to do with Petitioner, and was at risk of severe emotional damage if visitation was forced upon her. It is submitted that the guidelines utilized by the Nevada Supreme Court and the trial court were fully in accord with the statute (N.R.S. 128.105) and the governing principles of Due Process of Law, and that with regard to the substantive Due Process issue, no substantial federal question is presented for review by this Court.

2. The Nevada Statute Is Not "Void for Vagueness"

The Petitioner's next contention is that N.R.S. 128.105 is "void for vagueness" because it does not spell out with precision exactly what types of conduct might be determined to be detrimental to the welfare of a child, and therefore permitted her to suffer the punitive consequences of termination of her parental rights as the result of her decision to change her sex without giving her sufficient prior warning of such consequences. No authorities are cited in which any court has held that a statute similar to N.R.S. 128.105 which authorizes a State to terminate parental rights where there is "[r]isk of serious physical, mental or emotional injury to the child if he were returned to, or remains in, the home

of his parent or parents" (N.R.S. 128.105(4) or where the parent has exerted only token efforts "[t]o eliminate the risk of serious physical, mental or emotional injury to the child". (N.R.S. 128.105(5)(d)) This Court has not specifically addressed this issue, but it has been addressed by numerous lower courts, the vast majority of which have held that similar language is sufficiently definitive, that an attempt to enumerate specific types of abuse and neglect would create the risk of omission of some types of abusive conduct, and that it is common knowledge among most parents as to the type of conduct which can be considered harmful to the welfare of a child. See cases collected at Annotation, 22 A.L.R.4th, 774, 792-798 (1983). The N. Carolina Appellate Court expressed the generally-accepted and prevailing rule in *Re Biggars,* 50 N.C.App. 332, 274 S.E.2d 236, 22 A.L.R.4th 766 (1981) in the following language:

> "G.S. 7A-278(4). Our Court has not found it difficult to give a precise meaning to this definition of a neglected child in particular cases by analyzing the factual circumstances before it and weighing the compelling interests of the State with those of the parents and child. (Citations omitted) Viewed in this light, G.S. 7A-289.32(2) is not vague because the terms used in G.S. 7A-278(4) are given a precise and understandable meaning by the normative standards imposed upon parents by our society, and parents are, therefore given sufficient notice of the type of conduct that constitutes child neglect in this State. See 17 Ariz. L. Rev. 1055, 1070 (1975).
>
> * * *
>
> "We note that vagueness challenges to similar statutes have been increasingly made across the nation, but they have been almost uniformly rejected. See Comment, Application of Vagueness Doctrine to Statutes Terminating Parental Rights, 1980 Duke L. J. 336, 341; Day, Termination of Parental Rights Statutes and the Void for Vagueness Doctrine; Successful Attack on the Parens Patriae Rationale, 10 J. Fam. L. 213, 232 (1977-78); 70 Columbia L. Rev. 465, 469 (1970) . . . An 'impossible standard of legislative clarity' would be inappropriate in cases involving child care and

> custody. 'What might be unconstitutional if only the parent's rights were involved is constitutional if the statute adopts legitimate and necessary means to protect the child's interests.' *State v. McMaster,* 259 Or. 291, 296, 486 P.2d 567, 569 (1971) (rejecting a vagueness claim to the Oregon statute for termination of parental rights). If (sic) Accord, *In re Daniel H.* 591 P.2d 1175 (Okl. 1979) This context requires flexibility in the weighing of each case's facts in order to give the child, as well as the parent, the highest form of due process . . ."

See also, to the same effect, *Stjernholm v. Mazaheri,* 180 Colo. 352, 506 P.2d 155 (1973) and *Re F.I.D.* (Pa. Super. 1983) 464 A.2d 419.

As Petitioner recognizes, a statute which may on its face be vague nonetheless does not violate Due Process if it has been construed by the State in such a manner as to give it sufficient precision. (*Kolender v. Lawson,* 461 U.S. 352, 355; *Hoffman Estates v. Flipside, Hoffman Estates Inc.,* 455 U.S. 489, 494 n.5 (1982). The Nevada statute has been so construed. In *Cloninger v. Russell,* 98 Nev. 597, 655 P.2d 528 (1982), the Nevada Supreme Court judicially adopted the clear and convincing evidence standard of proof in compliance with *Santosky v. Kramer,* 455 U.S. 745 (1982). In *Champagne v. Welfare Division of the Nevada State Department of Human Resources,* 100 Nev. 646, 691 P.2d 849 (1984), the Nevada Supreme Court divided the consideration of termination of parental rights into a two-step process, first requiring "jurisdictional grounds" which are the factors enumerated in the statute, N.R.S. 128.105, including the grounds involved herein as set forth in N.R.S. 128.105(4). Assuming that the jurisdictional grounds are established, i.e. that there is clear and convincing evidence of neglect, abuse or damage to the physical, mental or emotional well-being of the child, then the Court must consider the "dispositional" remedy, i.e. whether termination of parental rights or some other remedy is more appropriate under the specific facts of the case. In considering "jurisdictional" grounds, i.e. the statutory bases authorizing termination of parental rights, the Court very carefully delineating the type or character of conduct which could lead to

the drastic consequence of termination of parental rights, stating: [100 Nev. at p. 648-649]

> "For example, a judicial determination that a child has been neglected may call for varying degrees of state intervention, ranging from mild reprimand to permanent termination of parental rights. Neglect is a relative term applied to a child who 'lacks the proper parental care by reason of [parental] fault.' N.R.S. 128.014. Although it is difficult to define 'proper', it is probably true that all parents are at one time or another guilty of neglecting to give their children 'proper' care. To provide a jurisdictional basis for termination, neglect must be serious and persistent and be sufficiently harmful to the child so as to mandate a forfeiture of parental rights. In such a case a parent may be adjudged to be *unsuitable* to maintain the parental relationship, and therefore, to *deserve* to lose it. (Emphasis by Court)
>
> "The same principles apply to the jurisdictional ground of unfitness. Unfitness is the other side of the neglect coin. Neglect defines a condition of the child; unfitness describes a condition of the parent. A neglected child is one who does not receive '*proper*' care; an unfit parent is one who fails to provide a child with '*proper*' care. Again; all parents are guilty of failure to provide proper care on occasion; and a parent does not deserve to forfeit the sacred liberty right of parenthood unless such unfitness is shown to be severe and persistent and such as to render the parent *unsuitable* to maintain the parental relationship.
>
> "In like manner, abuse of a child may or may not render a parent unsuitable to be a parent. N.R.S. 128.105 lists as a ground or consideration for termination '[r]isks of serious physical mental or emotional injury to the child if he were returned to, or remains in the home . . . ' Such a risk may be mitigated, and a child may be safely returned to the home; or the risk may be of such magnitude and persistency as to render the parent unsuitable and justify forfeiture of parental rights."

The Court further amplified, in footnotes 5 and 6, pp. 648-649, on the term "unsuitability" as being a condition of persistent fault or incapacity resulting in an irremedial ability to function as a proper parent. It is submitted that the careful definition by the Nevada Supreme Court gives sufficient definition to the statutory jurisdictional grounds for termination to provide full and fair warning to parents of the type of conduct which can lead to termination of parental rights. There is no requirement that the statute specifically state that sexual misconduct, or unacceptable "alternative" lifestyles, or commission of a felony, or any other specific conduct will or may lead to such consequences.

In an illuminating demonstration of the "selfishness" towards his own needs irrespective of the consequences to his daughter, the Petitioner contends that she was not forewarned that following medical advice to undergo sexual reassignment surgery could result in the loss of her parental rights. As noted above, it was not her gender dysphoria or his sexual reassignment surgery which led to the termination of her rights; it was the manner in which she conducted her lifestyle and the environment to which she subjected the child while she was with her which resulted in the severe emotional trauma to the child. Even when the prospect of termination of her rights became a reality, she still insisted on her right to expose the child to her "friends" and insist that the child accept them, understand them and mingle with them. This lifestyle created a persistent and apparently irremediable situation of neglect and mental and emotional abuse of the child which Petitioner cannot or will not acknowledge because of her focus on her own desires irrespective of how they affect the child. The Statute as construed by the Nevada Supreme Court in the *Champagne* case gives clear warning that such conduct may lead to the termination of parental rights if that remedy is deemed to be in the best interests of the child. Significantly, both the majority and the dissenting Justices in the case at bar found that the jurisdictional, i.e. statutory, grounds for termination were established by the record in the case at bar—they differed as to the dispositional remedy only.

It is respectfully submitted that the Petitioner's gender dysphoria and her decision to undergo sexual reassignment sur-

gery were matters which would not necessarily have led to the termination of her parental rights, if they had not had such a disruptive effect on the emotional and mental health of the child. However, by reason of the Petitioner's own fault in placing her rights and choices paramount to the rights and interests of the child, she created a situation which rendered her unsuitable to function as a proper and acceptable parent. The statute as construed gave her sufficient warning of such potential consequences, and having made the choice to conduct her lifestyle in a manner inimicable to the interests of the child, she has been properly held to have forfeited her right to continue to be a parent to such child. Whether termination or her rights or some lesser consequences was an appropriate remedy under the circumstances is something that can only be determined on the specific facts of the case, and is uniquely an issue of state law which does not involve any federal question. The majority of the Justices of the Nevada Supreme Court felt that under the circumstances, in light of Mary's feelings and reactions, termination of Petitioner's rights was the appropriate remedy. This Court should not, by its own precedents, interfere with that determination.

3. The Nevada Statute, as Applied, Did Not Deprive Petitioner of the Equal Protection of the Law

The final contention of the Petitioner is that the order terminating her rights denied her the equal protection of the law because a classification which permits a transsexual's rights to be terminated because of such transsexualism if an "irrational classification". Again, the Petitioner's focus is distorted, because the termination order was not because of her gender dysphoria as she repeatedly claims, but rather because of its effect on the child.

This Court has not directly addressed the issue of "transsexualism" in terms of the Equal Protection Clause, but it has been frequently recognized in the lower federal courts that "transsexuals" are not a suspect classification, and that therefore only a rational basis or nexus is required to justify such classification if in fact it has occurred. The federal courts have been almost unanimous in holding that no cause of action for discrimination against a transsexual exists under Title 42 U.S. 1981, 1983 or 1985, or under Title 42 U.S.C. 2000(e)2. (*Grossman v. Bernard's Town-*

ship Board of Education, (D.C.N.J. 1975) 11 CCH EPD ¶10686, affirmed (3rd Cir.) 538 F.2d 319, certiorari denied, 429 U.S. 897, 50 L.Ed.2d 181, 97 S.Ct. 261 (holding that dismissal of a teacher after sexual reassignment surgery did not state a cause of action under Title 42 U.S.C. § 1981), *Powell v. Reads, Inc.* (D.C. Md. 1977) 436 F.Supp. 369 (holding that discrimination against transsexuals did not state a claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000(e)2); *Holloway v. Arthur Andersen & Co.* (9th Cir. 1977) 566 F.2d 659 (holding that Title 42 U.S.C. §2000(e)2 did not apply to transsexuals and did not raise an Equal Protection problem since a rational basis was all that was required inasmuch as transsexuals are not a suspect classification); *Childers v. Dallas Police Department*, (D.C.N.D. Tex. 1981) 513 F.Supp. 134 (holding that discrimination against a homosexual by denying promotion was rationally justified by the fact that the tension between him and other officers who detested homosexuality would affect his effectiveness as an officer).

Further, federal courts have recognized that discrimination against homosexuals is not violative of the Equal Protection Clause provided there is a rational basis for the action taken related to such homosexuality. (*See McConnell v. Anderson*, (8th Cir. 1971) 451 F.2d 193, certiorari denied, 405 U.S. 1046, 31 L.Ed.2d 588, 92 S.Ct. 1312; *Gayer v. Schlesinger*, 160 App. D.C. 172, 490 F.2d 740, amd. 161 App. D.C. 216, 494 F.2d 1135 (1975); *McKeand v. Laird*, (9th Cir. 1973) 490 F.2d 1262; *Marks v. Schlesinger*, (D.C. Cal. 1974) 384 F.Supp. 1373; *Berg v. Clayton*, (D.C.D.C. 1977) 436 F.Supp. 76.

The Nevada statute does not attempt in any way to classify the types of conduct which may lead to termination of parental rights, or to indicate that any particular class membership will cause a termination of such rights. The statute applies to conduct and conditions created by parental unfitness or abuse and by child neglect, regardless of whether the parent who is responsible is heterosexual, homosexual, transsexual, bisexual or even asexual. Deviant or unacceptable sexual conduct may lead to termination of parental rights if, but only if, it creates a persistent and irremediable risk to the emotional welfare and mental health of

the child, and it makes no difference whether such conduct is committed by a heterosexual female, a homosexual male, or a transsexual. It is the effect on the child which matters. Thus in the *Champagne* case, the Nevada Supreme Court upheld the termination of the Champagnes' parental rights, even though they appeared to be a sexually normal heterosexual couple, because the environment of drug abuse, child abuse, lack of supervision and the violent temper of Mr. Champagne created a substantial risk of physical, mental and emotional injury to the children. (100 Nev. at p. 660-661) Similarly it upheld the termination of the rights of a heterosexual mother who was a drug addict and who persisted in bringing unsuitable people into the home. (100 Nev. at p. 662) It is thus clear that the statute is applied evenhandedly to all classes of people, including transsexuals, who create atmospheres, environments, and conditions which render them unsuitable to be parents. That is what the Petitioner had done, as is clearly manifested from the record of emotional suffered by Mary when she has been required to visit with him, and he has been treated no differently than anyone else would have been under the circumstances. His sexual preferences or condition are relevant only to the extent that they contributed to the creation of such conditions, and it is therefore respectfully submitted that no substantial federal question regarding the Equal Protection of the Law has been raised by his Petition.

It should also be noted that this case does not involve termination at the instigation of the State, thereby aligning all the power and authority of the State against the Petitioner, as was the case in the authorities upon which Petitioner relies. This action to terminate parental rights was instituted by Respondent, the custodial parent, and was defended by Petitioner with the full assistance of counsel and expert witnesses. The Supreme Court of Nevada found that the Trial Court's findings of fact were amply supported by the record. The Petitioner has had a full and fair opportunity to defend his parental rights with all of the procedural advantages which the Due Process Clause guarantees, plus additional protections guaranteed by the statutes. His case was carefully considered by the Trial Court and the Supreme Court of Nevada in light of applicable principles of state law. This case is similar to *DiStefano v. DiStefano*, 60 App. Div. 2d 976, 401

N.Y.S.2d 636, 6 A.L.R. 4th 1291 (1978) in which the Court noted:

> "Despite the efforts of the wife to raise due process, equal protection and other constitutional questions concerning her claim to sexual privacy free from governmental interference, no such issue is presented here. Although she is an admitted practicing homosexual, the trial court found that homosexuality *per se*, did not render her unfit as a parent. The court made no effort to restrict her preferred sexual activity, although deviate sexual intercourse remains a crime in this state. . . ."

CONCLUSION

Although Petitioner attempts to inject constitutional issues into this case, it is abundantly clear that the facts and circumstances reflected by the Record amply demonstrate the absence of such issues or any substantial federal questions presented for review in this Court. This case is a classic traditional case of the application of state law principles to a state law issue, and it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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